

FREE PARLIAMENTS:
OR, A
VINDICATION
OF THE ^{514. 12. 10}
Fundamental Right ¹⁵
OF THE
COMMONS of ENGLAND
In PARLIAMENT Assembled,

To be sole Judges of all those Privileges of
the Electors and of *the Elected*; which are
absolutely necessary to preserve *Free Par-*
liaments, and a *Free People*.

BEING A
JUSTIFICATION
Of the Proceedings of the
Honourable House of COMMONS,
In the CASE of
ASHBY against WHITE.

Nolumus Leges Anglia Mutari.

By Sir HUMPHREY MACKWORTH,
a Member of Parliament.

LONDON: Printed, and are to be Sold by J. Nutt near
STATIONERS-HALL, 1704.

THE HOUSE OF COMMONS

IN PARLIAMENT ASSEMBLED

THE PETITION OF

THE COMMONS OF GREAT BRITAIN

IN PARLIAMENT ASSEMBLED

For that the Judges of all the Privileges of
the House and of the Members thereof which are
and ought to be preserved to the People
and to the Kingdom

IN PETITION

Of the Proceedings of the
House of Commons

In the Case of
JAMES WHITE

By Sir HUMPHREY MACKENZIE
a Member of Parliament

LONDON: Printed and sold by J. WATKINS
STATIONERS-HALL, 1704

P R E F A C E.

THE House of Commons have on all Occasions, and more particularly in the last Session of Parliament, so fully demonstrated their Duty and Loyalty to their Sovereign, their Fidelity to their Country, and their Zeal to dispatch the necessary Supplies, and other Publick Affairs, for the general Good and Welfare of the People, that it must be a Matter of Admiration, and even Astonishment to all good Men to hear, that any Commoner in England, in his right Senses, should be wanting to have the greatest Respect and Veneration for that August Assembly.

A Free Parliament hath ever been esteemed, and found by constant Experience, to have been the great Bulwark of the Rights and Liberties of the People: And although it is not to be imagined that there is any such thing as Infallibility upon Earth, yet next under God, and a Gracious Sovereign, our Happiness hath ever been secured by their Administration.

It is true indeed, that the Two Houses of Parliament have had the Misfortune of late to differ in Opinion from one another; but, since it must be presumed that Both do aim at the same Common End, the Publick Good; it cannot be imagined but right Reason will at last prevail, and produce that Peace and Union so earnestly recommended from the Throne, and so very becoming all those who are joined together in the same Religion and Interest.

The Particulars in which they do at present vary in their Judgments are of different Natures; but that which is most strongly argued against the Commons, is, The Case of Ashby and White, upon which a learned Argument hath been lately published by their Lordships, for whom the Author of this Treatise has so great a Deference and Veneration, that in

P R E F A C E.

his private Capacity, abstracted from the publick Trust reposed in him, he should readily submit his own Opinion to their superior Judgments.

But, since he has the Honour to be one of those who are entrusted with the Rights and Liberties of their Country, and since it is the Duty of all Persons in that Station to act with Sincerity and Courage, according to the best of their Understanding, in discharge of the great Trust reposed in them, and in Defence of the Rights of the Commons of England; he humbly hopes it cannot possibly give the least Offence to any Person whatsoever, that he hath, in all dutiful manner, humbly offer'd to Consideration, some of those Reasons that induced the House of Commons to pass such Votes and Resolutions on this Occasion, as have been published to all the World.

If the Arguments in this Treatise are of any weight, if it be therein sufficiently proved that the Commons have discharged their Duty in this Particular, all good Men will be glad to see that Constitution supported and maintained, which is absolutely necessary to preserve the Publick Safety: And if the Reasons here offered are not sufficient to convince some Persons of an Error, yet it may be reasonably hoped, they will so far prevail, as to convince all Men, that the Commons have acted with great Sincerity; and, as they apprehended, for the general Good and Safety of the People.

It will be also considered, That if so much can be said on the behalf of the Commons by one of the weakest of their Members, what may be said by the whole House, when they shall have an Opportunity to answer for themselves.

But if the Commons have discharged their Trust with great Fidelity to the Publick, even in this particular Case, all Men of Temper will be inclined to have a very favourable Opinion of them in the other Matters in variance, which may with far less Difficulty be brought to a right Determination; or at least they will be pleased to do that Justice to their Representatives that they would have every other Person do to them; and that is, to suspend their Judgment till they have fairly heard what may be said in their Justification.

And here it must be confess'd, That it is a great Misfortune to England, that any other Methods should be taken for adjusting

P R E F A C E.

adjusting the Misunderstandings between the Two Houses, than those that have been established in the Original Institution of Parliaments, and have ever been found successful to the Nation.

When Two great Branches of the Body Politick are so unhappy as to differ about their Rights and Privileges, and the one will not agree to any Conference with the other in a Point of Judicature, it may indeed be very proper to appeal to the Sovereign Head of that great Body; but whether it is consistent with the Constitution of Parliaments to appeal to those, who can never meet to decide the Controversy, nor to hear the Case fairly argued and debated before them, is a Matter to be referred to farther Consideration; for if there is a Necessity of chusing Representatives, because it is not possible for all the People to meet together and act in a judicial Capacity, how can it be thought proper that any Cause should be referr'd back to their Determination.

And yet the thing it self is not more extraordinary, than the Manner of doing it, which I forbear to mention for particular Respects; for, though the Commons have ever had a Right of Impeaching others, it was never yet known that they themselves were liable to Impeachments.

But, notwithstanding the present Disputes, it is not too late to hope for a good Understanding between the Two Houses, (which is so absolutely necessary to promote the Happiness of her Majesty, and the Prosperity of the People) if the Differences within, are not industriously kept up by Incendiaries without Doors.

It is not possible to imagine that Men of Quality, Estates, and Families, in either House, can design to embroil the State with private Dissentions, at a Time when there is so great Occasion for an united Strength against the Common Enemy; and it can never be doubted, but the House of Commons will be ready to embrace all reasonable Methods of promoting a good Correspondence with that August Assembly, amongst whom, they have so many noble Friends, that have ever had a tender regard for their Rights and Privileges. And indeed, it is as much the Interest of the Commons to preserve the just Rights of the Lords, as it is

P R E F A C E.

to preserve their own, since neither can be secure without preserving both.

Far be it then from the Thoughts of any true English Subject to believe, that their Representatives have willingly engaged in this unhappy Controversy; much less that they are contending for a Trifle, or a Shadow, and not for the Fundamental Rights and Privileges of all the Commons of England.

And if this be the Truth of the Case, if the Rights of the People (whether Church-men or Dissenters) are the things which are here contended for by the Commons; we may reasonably hope, that however the People of England may differ in Opinion from one another in any other Matters, yet in these they will be all of one Mind, and united together.

And when the People of England shall have an Opportunity to be fully inform'd of all the Proceedings of both Houses in the last Session of Parliament, and especially in the Case of Wharton and Squire, they will then be made more sensible who are the best Patriots of their Country, and on whom it is that they are chiefly to depend for their future Security.

And it is pity That Case had not been stated amongst all the rest, and transmitted down to every County and Corporation, as an Instance of the Care of some great Men, to preserve the Rights and Properties of the Subject.

But alas! it is the peculiar Misfortune of this Age, that the House of Commons may neither defend the Prerogatives of the Crown, nor the Liberties of the People without Reproach.

But what Liberty may be taken by others, may more properly appear by the Facts themselves, than by any private Representation.

However, this may be asserted with great Truth, That no House of Commons ever discharg'd their Duty with greater Sincerity, or more for the Publick Good, how much soever they may have suffered for it; and of this the following Case, rightly consider'd, will appear to be a most eminent Instance.

The CONTENTS.

T HE State of the Case,	Page 1
The Resolutions of the Commons,	1, 2
The Resolutions of the Lords,	2, 3
Observations of the Commons,	3, 4

The First Position laid down by the Commons, That all Matters of Parliament are cognizable there, and not elsewhere, proved by Authority and by Reason, 5, 6

The Second Position, That the Right or Privilege of Voting, and the Qualification of Persons to give their Votes in the Election of Members to serve in the House of Commons, is a Matter of Parliament, and therefore not cognizable elsewhere, 7

This Position demonstrated, 1st, From the Original Frame and Constitution of the Government, *ibid.*
 2. *From a Fundamental Rule, and a Maxim of the Law, and Custom of Parliament,* 9
 3. *From a general Concession of all Parties,* *ibid.*
 4. *From the Usage and Practice of the House of Commons, and the known Laws and Statutes of the Realm* 10

The Third Position, That when the Vote of an Elector is pronounced and offered at an Election for any of the Candidates (as it was in the Case before us, for Sir Tho. Lee, and S. Mayne, Esq;) and the same is not received and admitted on the Poll by the proper Officer; the Elector, the Plaintiff, is not thereby debarred of his Vote, and consequently is not entituled to an Action at Law

THE CONTENTS.

Law for Recovery of Damages; but for such Default in the Officer, there is a Remedy to be had in the House of Commons, which is proper and adequate to the Nature of the Offence, 12

And here the Author considers,

1. *The Nature of the Right or Privilege of Voting,* ibid.
2. *The Nature of the Wrong or Offence committed by the Officer who acts in these Cases as a Judge,* 14
3. *The Nature of the Remedy which is given in such Cases by the House of Commons, and* 16
4. *To demonstrate that this Remedy is proper and adequate to the Nature of the Offence,* 19

The Fourth Position, That the establishing another Jurisdiction besides that of the House of Commons to hear and determine Controversies between the Electors and Officers concerning the Right of Voting, or the Qualification of Electors to give their Votes in the Election of Members to serve in Parliament, will expose all Mayors, Bailiffs, and other chief Officers to Multiplicity of Actions, vexatious Suits, and unsupportable Expences; and will subject them to different and independent Jurisdictions, and inconsistent Determinations in the same Case without Relief; and upon the whole Matter will not be consistent with the Constitution of Parliaments, or the publick Safety, 21

- Proved by several Instances,* ibid.
Several Objections answered, 28
The Reasons against the Action summ'd up in short, 29
The Resolutions of the Commons justified against the Resolutions of the Lords, 29, 30
The Conclusion, 30, 31

The

*The CASE wherein MATTHEW ASHBY,
was Plaintiff against WILLIAM WHITE,
and others, Defendants; was (in short)
as followeth,*

THE Plaintiff Ashby declares, That he being a Burgess and Inhabitant of the Borough of Alesbury, duly qualified to give his Vote in the Election of Members to serve in Parliament for the said Borough, was there ready (at the last Election) and offered his Vote to the Defendants, (who were the chief Officers, and had the Management of that Election) for the Choice of Sir Thomas Lee, and Simon Mayne, Esq; and that the said Defendants were then required to receive and admit of his Vote accordingly; which they refused, and this he charges to be done fraudulently and maliciously, to defeat him of that his Privilege: And because his Vote thus offer'd was not received and admitted on the Poll, he concludes, That he was hindred from giving his Vote, and that the two Burgesses were elected without any Vote given by the Plaintiff to his Damage, &c. and after Verdict for the Plaintiff, (the Matter of Fact not being then contested) the Defendants by their Council, moved the Court of Queen's Bench in arrest of Judgment; alledging, That this being a Matter which did concern the High Court of Parliament, and was properly Cognizable in the House of Commons, no inferiour Court could by Law take Cognisance thereof; and this Point being solemnly argued, first by Council and afterwards by the Judges, the said Court did determine, That the Plaintiff had no good Cause of Action, and thereupon Judgment was given and entred for the Defendants.

Whereupon the Plaintiff brought a Writ of Error in Parliament, to reverse the said Judgment given in the Queen's Bench: And the House of Peers were of Opinion, That the said Judgment was Erroneous; that the Plaintiff had good Cause of Action, and ought to have Judgment.

And thereupon the House of Commons appointed a Committee to inspect the Lords Journals, relating to these Proceedings, and upon Report thereof in the last Session of Parliament, they came to the following Resolutions.

Resolved, ' That according to the known Laws and Usage of Parliament, it is the sole Right of the Commons of England in Parliament assembled (except in cases otherwise provided for by Act of Parliament) to examine and determine all Matters relating to the Right of Election of their own Members.

Resolved, ' That according to the known Laws and Usage of Parliaments, neither the Qualification of any Elector, or the Rights of any Per-

son elected, is cognizable or determinable elsewhere than before the Commons of England in Parliament assembled, except in such Cases as are specially provided for by Act of Parliament.

Resolved, That the examining and determining the Qualification or Right of any Elector, or any Person elected, to serve in Parliament, in any Court of Law or elsewhere, than before the Commons of England in Parliament assembled (except in such Cases as are especially provided for by Act of Parliament) will expose all Mayors, Bailiffs and other Officers, who are obliged to take the Poll, and make a Return thereupon, to Multiplicity of Actions, Vexatious Suits, and Unsupportable Expences, and will subject them to different and independent Jurisdictions, and inconsistent Determinations in the same Case, without Relief.

Resolved, That Matthew Ashby having in Contempt of the Jurisdiction of this House, commenced and prosecuted an Action at common Law against William White, and others, the Constables of Alesbury, for not receiving his Vote at an Election of Burgesses to serve in Parliament for the said Borough of Alesbury, is guilty of a Breach of the Privilege of this House.

Resolved, That whoever shall presume to commence or prosecute any Action, Indictment, or Information, which shall bring the Right of the Electors or Persons elected to serve in Parliament, to the Determination of any other Jurisdiction than that of the House of Commons (except in Cases specially provided for by Act of Parliament) such Person and Persons, and all Attorneys, Solicitors, Counsellors, and Sergeants at Law, Soliciting, Prosecuting, or Pleading in any such Case, are guilty of a high Breach of the Privilege of this House.

Ordered, That the said Resolutions be fixt upon Westminster-Hall Gate, signed by the Clerk.

These were the Votes and Resolutions of the House of Commons, who have been formerly necessitated to take the same Methods upon the like Occasion. They did not willingly enter into this Controversy, especially at a juncture of time when Peace and Union were so necessary, and had been so earnestly recommended from the Throne: But they found themselves under a Necessity (as they apprehended) of passing such Votes and Resolutions in Defence of the Rights of the Commons of England.

Upon these Proceedings of the House of Commons, the House of Peers were also pleased to come to the following Resolutions.

It is Resolved by the Lords Spiritual and Temporal in Parliament assembled, That by the known Laws of this Kingdom every Freeholder, or other Person, having a Right to give his Vote at the Election of Members to serve in Parliament, and being wilfully denied or hindered so to do, by the Officer who ought to receive the same, may maintain an Action in the Queen's Courts against such Officer, to assert his Right and recover Damages for the Injury.

It is Resolved by the Lords Spiritual and Temporal in Parliament assembled, That the asserting that a Person having Right to give his Vote at an Election, and being hindered so to do, by the Officer who ought to take the same, is without Remedy for such Wrong, by the ordinary Course of

of Law, is destructive of the Property of the Subject, against the Freedom of Elections, and manifestly tends to incourage Corruption and Partiality in Officers who are to make Returns to Parliament, and to subject the Freeholders and other Electors to their Arbitrary Will and Pleasure.

It is Resolved by the Lords Spiritual and Temporal in Parliament assembled, That the declaring *Matthew Ashby* guilty of a Breach of the Privilege of the House of Commons, for prosecuting an Action against the Constables of *Alesbury*, for not receiving his Vote at an Election, after he had in the known and proper Methods obtained a Judgment in Parliament for Recovery of his Damages, is an unprecedented Attempt upon the Judicature of Parliament, and is in effect to subject the Law of *England* to the Votes of the House of Commons.

It is Resolved by the Lords Spiritual and Temporal in Parliament assembled, That the deterring Electors from prosecuting Actions in the ordinary Course of Law, when they are deprived of their Right of Voting, and Terrifying Attorneys, Solicitors, Counsellors, and Serjeants at Law from Soliciting, Prosecuting, and Pleading in such Cases, by Voting their so doing to be a Breach of Privilege of the House of Commons, is a manifest assuming a Power to controul the Law, to hinder the Course of Justice, and subject the Property of *English* Men to the Arbitrary Votes of the House of Commons.

Ordered, That the said Resolutions, together with the Report, be forthwith printed and published; and that the Lord Keeper do send them to all the Sheriffs throughout all *England* and *Wales*, to be by them communicated to all the respective Cities and Boroughs. This Order was made *Die Luna, 27. Martii, 1704.*

These were the Resolutions of the House of Peers, and for Support thereof, their Lordships have been pleased to publish a Learned Argument, Intituled, *A Report of the Lords Committees appointed to draw up the State of the Case upon the Writ of Error lately depending in the House of Peers, wherein Matthew Ashby was Plaintiff, and William White and others Defendants*; which Report by their Lordship's said Order, hath been transmitted to the Sheriffs of each County, and to the Mayors, Bailiffs, and other chief Officers of Cities, Boroughs, and Corporate Towns; and therein the Charge against the Commons is such, as seems to call upon the whole House, and upon every Member of that Honourable Assembly, to answer for themselves, and to set forth the Reasons that induced them to concur in passing such Votes and Resolutions: But the House of Commons having no Opportunity so to do, the said Report not being published till the Parliament was prorogued.

The following Reasons which are at present remembered as those that did prevail with very many Members, are here humbly offered to Consideration.

And First, They observed, That this was a *New Invention*, no such Action as this having been ever brought before by any Elector, since the Foundation of the *English* Government, and therefore ought not to receive any Favour or Countenance.

2dly, That they could not find either by Experience or by History, that any Inconvenience had ever happen'd to the Publick, for want of such an Action.

3dly, That this present Action upon the Case being a new Device ; it could not be supported by any Precedent or Judgment of Law in *Westminster-Hall*, but the Legality thereof must entirely depend upon the Authority of Reason regulated by our Constitution.

4thly, That the Reasons and Arguments chiefly made use of, to support this Action, were all founded upon a Supposition, That notwithstanding all Electors by reason of their Freeholds and Freedoms are entituled to a Legal Privilege of giving their Votes for Election of Members to serve in Parliament: Yet in case the Sheriffs, Mayors, or other chief Officers concerned in the Management of such Elections, shall refuse to receive and admit upon the Poll, the Votes which they shall offer at such Elections: The Electors are thereby debarr'd of their Votes, and deprived of their Right of Voting; and for such Default in the Officer, there is no Remedy to be had in the House of Commons, or at least not such as is proper and adequate to the Nature of the Offence: And from hence

It was concluded by the Lords, That this was the proper Remedy which the Plaintiff has pursued, and that the same was supported by the Grounds and Principles of the Ancient Common Law of England, whereof the chief Maxim insisted on was this, That every Right must have a Remedy to support and maintain it.

These were the main Points upon which the whole Controversy between the two Houses seem'd to depend; for if the Electors are not by such Default of the Officers debarr'd of their Votes, or if for such their Default, there is a proper Remedy to be had in the House of Commons. There can be no pretence for setting up a new Remedy for a Person that has suffer'd no Wrong, or for setting up TWO Remedies and TWO Jurisdictions inconsistent with one another, when the Law of England requires but ONE, and has provided and establish'd that One.

Now that the Remedy which the Plaintiff has pursued was not a proper one, and that the Votes and Resolutions of the House of Commons were well grounded, will (we hope) appear from the following Considerations, by which they were induced to pass the same.

1st, That all Matters of Parliament are cognizable there, and not elsewhere.

2dly, That the Right or Privilege of Voting, and the Qualification of Persons to give their Votes in the Election of Members to serve in the House of Commons, is a Matter of Parliament, and therefore not cognizable elsewhere.

3dly, That when the Vote of any Elector is offered at the Election for any of the Candidates, as it was in the Case before us, for Sir Thomas Lee and Simon Mayne, Esq; and the same is refused to be received and entred on the Poll by the proper Officer; The Elector is not thereby debarr'd of his Vote, or deprived of his Right of Voting, but for such Default in the Officer there is a Remedy to be had in the House of Commons, which is proper and adequate to the Nature of the Offence.

4thly,

ably, ' That the establishing another Jurisdiction at Law, besides that of the House of Commons, to hear and determine Controversies between the Electors and Officers concerning the Right of Voting, or Qualification of Electors, to give their Votes in Election of Members to serve in Parliament, will expose all Mayors, Balliffs, and other chief Officers (who are oblig'd to take the Poll, and make a Return thereupon) to Multiplicity of Actions, vexatious Suits, and unsupportable Expences, and will subject them to different and independent Jurisdictions, and inconsistent Determinations, in the same Case without Relief; and will not be consistent with the Constitution of Parliaments or the publick Safety.

These were the Positions laid down by Members of the House of Commons, and if it can be proved, that they are grounded on the Laws, Usages and Customs of the High Court of Parliament, and even upon the original Frame and Constitution of the Government. And if there be any Weight in that famous Maxim, *Salus Populi suprema Lex*; then there will be no occasion of answering the Arguments for the Action, Paragraph by Paragraph; for if the Foundation of them happen to fail, the Superstructure can never be supported, but the Action it self, and the Reasons given for it, must all give place together to a Superior Law.

The First POSITION

That all Matters of Parliament are cognizable there and not elsewhere.

This Position may be demonstrated both by Authority, and by Reason.

1st, By Authority; — And here it may not be improper to observe, in the words of my Lord Chief Justice Coke, in his fourth Institutes, and his Chapter of Parliaments; ' That the King and the three Estates of the Realm, that is to say, the Lords Spiritual, the Lords Temporal, and the Knights, Citizens and Burgesses in Parliament assembled (whether they do sit in one House as formerly, or in two Houses as at this day) do compose the great Body Politick of this Kingdom, and do constitute that Supreme Court call'd the High Court of Parliament.

And as every Court of Justice hath Laws and Customs for its Directions, some by the Common Law, some by the Civil and Canon Law, and some by peculiar Laws and Customs, &c. so the High Court of Parliament (says Coke) *suis propriis Legibus & consuetudinibus subsistit*, hath Laws and Customs peculiar to it self; and these Laws are not usually studied or understood by the Common Lawyers in Westminster-Hall, altho' they are Men of great Capacities, and of the most profound Learning in their own Profession.

These Laws (says Judge Coke) which are the very Heart-strings of the Common-wealth, would take up a whole Volume of it self; and to say the truth, the Laws, Customs, Liberties and Privileges of Parliament are better to be learn'd out of the Rolls of Parliament, and other Records, and by Precedents and continual Experience, than can be express'd by any one Man's Pen; Co. 4. Inst. p. 1. 14. 23. 49. 50.

And

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And in another Place he says, 'It is to be known that the Lords in their House have Power of Judicature, and the Commons in their House have Power of Judicature, and both Houses together have Power of Judicature; but the handling thereof, according to the Worth and Weight of the Matter would require a whole Treatise of it self, and it is best to be understood by reading the Judgments and Records of Parliament at large, and the Journals of the House of Lords and the Book of the Clerk of the House of Commons, which is a Record, as it is affirm'd by Act of Parliament. 6 H. 8. c. 16. Co. 4. Inst. p. 23.

And here my Lord Coke doth cite several Cases where Judgment was given by the Lords and Commons, and where Judgment was given by the Commons alone, and the Offenders fined and imprison'd by the Commons according to the Law and Custom of Parliament. To all which, for brevity sake, the Reader is refer'd. 4 Instit. 24.

And thus it may appear, that the High Court of Parliament hath Laws and Customs peculiar to it self, and that the two Houses have by those Laws a Power of Judicature jointly and severally according to the Nature and Reason of the Case before them; and altho' the Law and Custom of Parliament is a part of the antient Common Law of England, yet as this High Court is superior to the Courts of Westminster-Hall, so also is the Law of Parliament superior to that part of the Common Law which is used there; and therefore all Matters which concern the Parliament, must be cognizable there and not elsewhere.

'The Judges (says Chief Justice Coke) ought not to give any Opinion of a Matter of Parliament, because it is not to be decided by the Common Law (used in Westminster-Hall) but *secundum Legem & Consuetudinem Parliamenti*, by the Law and Custom of Parliament; and when Scrope insisted in a Matter relating to Parliament, upon a Rule or Maxim of the Common Law, in Favour of the Crown, *That the King might sue in what Court it pleaseth him*, the words of the Law Book are, *But Matters of Parliament are not, as hath been often observed, to be ruled by the Common Law*: And when the Lords in Parliament have asked the Judges any thing concerning the Course or Privilege of Parliament, they have ever answer'd, *That they know not nor can advise concerning them*; and as a learned Judge was pleas'd to argue, 'If we Judges do not know nor can advise concerning these things, how can we judge People upon them out of Parliament; we ought to know before we judge, and therefore we cannot judge at all, of things we do not know.

By these and many other Authorities it may most evidently appear, that the Judges of the Courts in Westminster-Hall, are not allowed so much as to give their Opinion, much less to pronounce Judgment upon Record, in a matter of Parliament; neither are the Rules or Maxims of the Common Law used in Westminster-Hall, even in the Case of the Crown it self, and consequently not in the Case of a private Subject, of any weight at all, against this superior Law and Custom of Parliament. But.

adly, This Position is also to be demonstrated from the Nature and Reason of the Case: For altho' Matters relating to an Inferior Court, may come regularly, by way of Appeal, to the Determination of a Superior; yet it was never known or heard, neither can it be consistent with Reason, that an Inferior Court should be admitted to judge of any matter, which concerns

concerns the very Being of a Superior; for that would be to subvert the order and course of Justice, which is observed in all Courts and Places whatsoever.

But this being a very plain point, and not disputed in general Terms till we come to Particulars, I shall pass it over, and come to the second Position.

The Second POSITION.

That the Right or Privilege of Voting, and the Qualification of Persons to give their Votes in Election of Members to serve in the House of Commons is a matter of Parliament, and therefore not cognizable elsewhere.

This Position may be demonstrated several ways.

1. From the original Frame and Constitution of the Government.
2. From a fundamental Rule and Maxim of the Law and Custom of Parliament.
3. From a general Concession of all Parties.

And, 4thly, By the constant Usage and Practice of the House of Commons, and by the known Laws and Statutes of the Realm.

And first, From the Original Frame and Constitution of the Government, For by this it is provided, and it is the noblest Privilege that any Subjects in the World enjoy, That no Laws can be made, no Rights diminish'd or alter'd but by their own Consent; such is the Excellency of our Constitution, and by this we are preserv'd a free People.

But the Commons of England being a numerous Body, not able (as the Lords are) to meet together in one Assembly to debate and resolve concerning the *ardua & urgentia Negotia Regni*, are necessitated to elect Representatives to meet, debate, and act for them, and to do all things requisite for the publick Safety; as if the Electors themselves were there assembled in their proper Persons.

It must be therefore one of the principal fundamental Privileges belonging to the Commons of England, and without which they can never be secure, To be sole Judges of their own Rights, as Electors; that is, to determine who are, and who are not qualified to give their Votes in every such Election; for if any others should be admitted to judge thereof, they can never be secure of a right Judgment, or of being truly represented by Persons duly elected and fit to be trusted with the Liberties of their Countrey.

And all the Electors in England are as much concerned to take care, that the Vote of a particular Elector be received and admitted, as he is himself, because it may be every other Elector's Case, as well as his, and the Safety of all depends upon doing Justice to every one.

It is also as necessary for the Common Safety, That Illegal Votes should be rejected, as that Legal Votes should be received; and they can never be assured, That the Right of Election shall be preserved in the Legal Electors, and that Illegal Representatives shall not be imposed upon them, unless they have the sole Judicature thereof in their own Power; that is, unless they have the sole right of judging of the Privilege and Qualification of Electors in

the best manner they are capable of judging of any other Matter, and that is, by their Representatives in Parliament.

And this is no more than what is usual and common to all other free Bodies of Men whatsoever, To be sole Judges of all those Rights and Privileges which are absolutely necessary to make them free: And whenever they can be persuaded to give up this fundamental Privilege, they may readily surrender up all the rest, which can by no other Means be secured to them;

They have indeed no Power over the Prerogatives of the Crown, or the Rights of the House of Peers, without their Concurrence in Parliament; but as to their own particular Rights and Privileges, which are inherent in them by reason of their Freeholds and Freedoms, and which are absolutely necessary to make them a free Branch of the High Court of Parliament, none can have the Judicature thereof, besides their own Representatives, whilst they continue a free People.

There is a great difference to be observed between the Rights of the Commons of England in their private and in their public Capacities; for tho' the private Differences of the Commons concerning their Freeholds and Freedoms, are submitted to the Determination of the Judges of Westminster-Hall, as Persons indifferently chosen and appointed by the Prince, to do equal Justice to all his Subjects; yet they have never submitted the fundamental Rights of the Commons of England in general, and in their public and politick Capacities as they are a free Branch of the High Court of Parliament, to the Determination of any other, but their own Representatives.

And this sort of Judicature being an original Right inherent in them by reason of their Freeholds and Freedoms, none can legally take it from them without their own Consents, any more than they can take from them their Freeholds themselves.

The House of Peers do claim a Privilege of being sole Judges of their own Rights, and of the Qualification of their own Members, and of all other Matters relating thereto, and necessary to their being Members of that Honourable Assembly, which is the great Privilege that makes them a free Branch of the High Court of Parliament. And the House of Commons must either have the same Privilege with relation to their Members, and all things necessary to the Election and Qualification of them and their Electors, or else there cannot be a free Parliament; neither can the Commons be able to preserve the Rights of the People, or the just Balance of the Constitution.

It must indeed be confess'd by all true Protestants, that there is no such thing as Infallibility upon Earth, and therefore it is not impossible but the House of Peers or House of Commons may one time or other be mistaken in their Judgments; but it is morally impossible that the House of Commons can ever commit such an Error as shall be fatal to the Constitution and the Liberties of the People; because it cannot be imagin'd that a free Parliament will destroy it self; But if any others should be admitted to judge of the Rights of Electors, their Errors may be of fatal Consequence to the People, because they may not only be as fallible as the Commons, but all Men will be as naturally inclin'd to get the Power into their own Hands; as the House of Commons will be to keep it in theirs, and consequently in the Hands of their Electors.

And forasmuch as the Power of judging who are qualified to vote in Election of Members to serve in Parliament is a greater Trust than any other committed to the House of Commons, because all the Rights and Liberties of the People do depend upon it; therefore it may be concluded, from the very Frame and Nature of our Constitution, that such a Power must be lodged in the House of Commons, and could not be entrusted with the Judges of the Courts in Westminster-Hall, because they are not Trustees and Representatives of the People.

2dly, The same Position may be proved, from a fundamental Rule and Maxim of the Law and Custom of Parliament, *That the House of Lords and House of Commons are independent of one another, and sole Judges of their own Rights and Privileges.*

And herein lies the great Security of all the People of England; for if either House were dependent on the other, there would be no need of two Houses, but that one which had the Power over the other, would be sufficient to do the Business of both, and would be able at any time to subject the People to an illegal and arbitrary Power; and if the Rights and Privileges of the two Houses, or of either of them should be subject to the Jurisdiction of an Inferior Court at Common Law, the whole Order and Course of Justice would be subverted, and there could be no such thing as a free Parliament.

Since then it is allowed, that the House of Commons are sole Judges of their own Rights and Privileges, and that the Rights and Privileges of the Electors and of the Elected are one and the same; it must be evident that the sole Judicature of the Right of Voting in every Election, being one of the fundamental Rights of the Electors, must be also one of those Rights and Privileges belonging to the Elected, and of which the House of Commons are the sole Judges by the Law and Custom of Parliament.

The House of Commons are truly said to be the whole People of England in Epitome contracted into a small Body, not only for the Ease and Convenience, but also for the Necessity of Government: They are the Commons of England in Parliament assembled, all the Power which by our Constitution is either granted or reserved to the People for their common Security is delegated to, and appointed to be exercised by, their Representatives in Parliament; and whatever is done by the Elected, is in consideration of Law done by the Electors; for *qui per alium facit, per seipsam facere videtur*; and any Person may as well separate the Soul from the Body, as the Interest of the Electors from that of the Elected; which in both cases is present Destruction.

If therefore the House of Commons have any Rights at all, they must certainly have that Right, which is absolutely necessary for their own Preservation; and without which they can never secure any other Right that belongs to them, or to those to whom they are entrusted; and if they have this Right, then they must be sole Judges of it, by the Law and Custom of Parliament.

3dly, This Position may be also proved from a general Concession of all Parties, *That the Right of Election of Members to serve in Parliament is solely determinable in the House of Commons and not elsewhere*; but how the Right of Election can be separated from the Right of Voting in that Election, is not easie to be imagined; when the House of Commons determines that

the Right of Election in such a Borough is for instance, in the Inhabitants paying Scot and Lot, what is the meaning of that Determination, but that the Right of Voting is in such Inhabitants? which is the same thing in other words, as the Right or Qualification of the Electors, which is the Matter in question.

‘ If one be duly Elected (says Lord Coke) and the Sheriff returns another, the Return must be amended, and the Person duly Elected must be inserted, for the Election in these cases is the Foundation and not the Return, Co. 4. Inst. p. 49. And how is this Election made but by the Votes of the Electors? If then the Electors make the Election, and the Election is the Foundation, the Right of Electors which lays that Foundation must needs be a principal Matter concerning the Parliament. And as it would be strange to alledge, that the upper Rooms do belong to a House, and not the Lower by which they are supported; so it would be equally strange, That the Rights of the Elected should concern the Parliament, and not the Rights of the Electors which are the Foundation of them.

It is a fundamental Maxim in the Law of England, *Quando Lex aliquid concedit, concedit et id, sine quo res ipsa esse non potest*, When the Law grants a Power, it grants every thing that is necessary to support that Power, or else (in effect) it grants nothing at all. If therefore the Law has given the House of Commons a Power to try the Right of Election, and they cannot try that Right unless they have also a Power to try the Right of the Electors, then by this Maxim, the same Law that gave them a Jurisdiction to try the Right of one, gives them Authority to try the Right of the other; and if so, then no Authority, by our Constitution, ought to over-rule their Determination, or which is all one, to contradict it; and therefore the Commons must have the sole Judicature of the Rights of Electors, as being a Matter of Parliament and not cognizable elsewhere.

4thly, And Lastly, This Position may be farther proved from the constant Usage and Practice of the House of Commons, and by the known Laws and Statutes of the Realm.

The very first thing that is determined on the Trial of all Elections in the House of Commons, is the Right of Election, that is to say, who are qualified to vote in the Election of Members to serve in Parliament for that Borough; whether the Inhabitants at large, or those paying Scot and Lot, or a select Number, or those that hold by Burgage Tenure, be the legal Electors; and what is this, but a Judicature of the Rights of the Electors? And this Judicature has been held so necessary to preserve free Parliaments, that in the 7th and 8th Year of the late Reign of King William, of Glorious Memory, it is Enacted, ‘ That if any Person shall return a Member to serve in Parliament contrary to the last Determination of the House of Commons, it shall be adjudged to be a false Return. What can more plainly demonstrate, ‘ That the Right of Voting, and the Qualification of Electors is a Matter of Parliament, and consequently not cognizable elsewhere?

The Lord chief Justice Coke tells us, ‘ That after the Precept of the Sheriff directed to the City or Borough for making of Elections, there ought, *secundum Legem & Consuetudinem Parliamenti*, to be given a convenient time for the day of Election, and sufficient warning given to the Citizens and Burgeses that have Voices, that they may be present, otherwise the Election

' Election is not good, *Co. 4. Inst. p. 49.* By which it plainly appears, that the Right of Electors was a Matter of Parliament; and that the same was taken care of, by the Law of Parliament, and not by the Common Law.

And in the next Paragraph Judge Coke says, ' That any Election or Voices given before the Precept be read and published are void and of no force; for the same Electors after the Precept read and published, may make a new Election and alter their Voices; but by what Law? not by the Common Law, but as he there informs us, *by the Law and Custom of Parliament.*

And it appears by innumerable Precedents in the Journals of the House of Commons, that all Questions, with relation to the House of Commons, from the beginning of the Election to the end of the Session, ' As who shall be deem'd and taken to be legal Electors? Who shall take the Poll? Between what Hours of the Day? What Notice shall be sufficient to be given of the time of the Election? What Freedom shall be allowed to Electors in giving their Votes; to the Sheriffs, Mayors, and other chief Officers in taking and entring those Votes upon the Poll; to the Persons Elected, in speaking and acting freely for the Good of their Country? It is known that all these and the like Questions have been from time to time determined in the House of Commons by *the Law and Custom of Parliament*, and therefore they are not cognizable elsewhere except in cases otherwise provided for by Act of Parliament.

The Common Law in *Westminster-Hall* had nothing to do with these Matters of Parliament; the common Lawyers generally speaking, unless some few Persons, who had been Members, or had particularly studied the Law of Parliaments, do not pretend to give any Advice or Opinion of Matters of this Nature; neither do they think it any Disparagement to them to be unskill'd therein.

And whenever the Commons observ'd, that by *the Law and Custom of Parliament*, the Rights of Electors was not sufficiently secured, nor the Offenders against that Right sufficiently punished, tho' they would not suffer any new Device or Invention to be set up by inferior Judges, yet they have often contriv'd a farther Remedy by Authority of Parliament; as may appear by the several Statutes made 8 H. 6. cap. 7. — 10 H. 6. cap. 2. — 23 H. 6. cap. 15. — 7 W. 3. cap. 4. — 7 & 8 W. 3. cap. 7. — 7 & 8 W. 3. cap. 15. — 7 & 8 W. 3. cap. 25. — 10 & 11 W. 3. cap. 7.

And all those Statutes may be brought to prove, that the Rights of the Electors and of the Elected are *Matters of Parliament*, and that the same were not cognizable elsewhere; for if they were, there had been no occasion for all those Statutes, but *the Electors and the Elected* might have recover'd their full Damages at Common Law.

And thus with great Submission it seems to be demonstrated,

1st, *From the Original Frame and Constitution of the Government; That as all Legal Electors, by reason of their Freeholds and Freedoms, and for the Security thereof, are originally entituled to a Privilege of giving their Votes in the Election of their own Representatives to serve in Parliament; by the very same Reason they must also have the sole Right of judging and determining by those Representatives who are, and who are not qualify'd to give their Votes in every*

such Election, or else they can have no manner of Security at all, nor can be in reality a free People.

2dly, That the House of Commons by a fundamental Rule and Maxim of the Law and Custom of Parliament, are sole Judges of their own Rights and Privileges; and by consequence of the Rights and Privileges of all the Commons of England; which (as far as is possible) are delegated to them as their Representatives: And it being necessary for the Electors to have the sole Power, to determine some way or other, who are duly qualify'd to vote in all Elections, and the *Elected* being intrusted with all their Rights and Privileges, they must have this also amongst the rest, and be the sole and proper Judges in the Case before us.

3dly, That the Right of Election is solely determinable in the House of Commons, and the Rights of the Electors being the Foundation of the Rights of the *Elected*, and necessary to the very Being and Essence of a free Parliament, is therefore a principal Matter concerning the Parliament, and consequently not cognizable elsewhere.

And, 4thly, The same Position is proved by the constant Usage and Practice of Parliament, and by the known Laws and Statutes of the Realm, as hath been demonstrated; — I come now to

The Third Position.

That when the Vote of an Elector is pronounced and offerred at an Election for any of the Candidates (as it was in the Case before us, for Sir Tho. Lee, and S. Mayne Esq;) and the same is not received and admitted on the Poll by the proper Officer; the Elector, the Plaintiff, is not thereby debarred of his Vote, and consequently is not entituled to an Action at Law for Recovery of Damages; but for such Default in the Officer, there is a Remedy to be had in the House of Commons which is proper and adequate to the Nature of the Offence.

To make this Position plain and evident to the meanest Capacity, it may not be improper to consider,

1st, 'The Nature of the Right or Privilege of Voting claimed by the Elector:

2dly, 'The Nature of the Wrong or Offence committed by the Officer; and,

3dly, 'The Nature of the Remedy which is given in such cases by the House of Commons; and then,

4thly, 'To demonstrate that this Remedy is proper and adequate to the Nature of the Offence.

And first, As to the Nature of the Right; it was observed in the House of Commons, that there are several sorts of Rights in Consideration of Law;

There are Rights of Property and Rights of Privilege; and of Privileges, some are attended with a private Profit, and some are not; of those that are not, some are personal Privileges, that no ways concern the Publick, nor have any other End, but the Ease or Pleasure of a particular Person; and others are of a publick Nature, and are not granted to a particular Person for his own private Advantage, but for the general Good of that Kingdom

or

or Commonwealth of which he is a Member; and such Privileges being granted to particular Persons for the good of all, and only as a means to attain some publick Good. The whole Community are chiefly concerned for the Preservation of such Rights, as that on which the common Safety doth depend.

And such a Right as this they did apprehend *the Privilege of Voting in Elections to be*. It is not a Right of *Property*, nor of *Privilege*, attended with any particular Profit, or for a private End; but it is a *Liberty or Privilege*, which every Legal Freeholder, Citizen, and Burgesses have by reason of their Freeholds and Freedoms, to this end only that they may all be truly represented in Parliament, by Persons duly elected and fit to be trusted with the Liberties of their Country.

This is the *Principal Right* of all Electors, and the *Privilege of Voting* is only a means to preserve that Right; and it is so far from being attended with any particular or private Profit, abstracted from this publick Consideration, that it was always esteem'd by our Ancestors, to be a *Charge and Burthen*, which Electors were obliged to undergo for their common Security.

And this will appear more plain and evident, if we look back and consider the Original Institution of Parliaments; for in the Beginning, the Representatives were elected to *serve* their Country, and for such their *Service* they were to receive *Wages* from their Respective Electors; by which it may appear, that the Privilege of the Electors was esteem'd a *Service*, and the Privilege of the Electors a *Charge and Burthen*; From which in former times, many of them did desire to be excused by reason of their Poverty.

And although it may be a commendable thing, that Gentlemen of Estates and Qualities, are now willing to serve their Countries, at their own Expence: Yet this may shew the Nature of the Constitution, and how far our Ancestors were from thinking this to be a *Right of Property or Privilege that was attended with any personal Profit, or ought to be repaired with any Damages to the Party*.

But as there are several sorts of *Rights and Privileges*, so there are also several sorts of *Laws and Courts*, appointed for the Preservation and Security of them. Some Rights are secured by *Common Law*, some by the *Canon or Civil Law*, and some by the *Law and Custom of Parliament*: And as the *Law* varies, so does the *Remedy*. Those Arguments which would be very proper to be used in Actions for Recovery of Damages at Common Law, might perhaps be reasonable in their own Nature, to be offer'd for Recovery of Damages for Non-payment of a Legacy in the Spiritual Court; for *whoever denies to pay a Legacy that is bequeathed to another, does ill, that is certain*: And then if the *Law* does not allow an Action to the Party injured, it tolerates the Injury, which is absurd to say is tolerable in any Government. And yet this plausible Argument is of no Weight at all in this Case, because this Right is secur'd in another Court and by another Law; and the Remedy in that Court being approved for time immemorial, no Man shall be admitted to argue from the *Grounds and Principles of the Ancient Common Law of England*, that those Remedies which are used by the *Canon Law in the Spiritual Court*, are not proper and adequate to the Nature of the Offence.

In like manner, the Right or Privilege of Voting in Elections of Members to serve in the House of Commons, being a Matter of Parliament, and not cognizable elsewhere, no Person may be allow'd to argue upon any Default in the Officer, what sort of Remedy is proper and adequate to the Nature of the Offence from the Reason of *that part of the Common Law*, which is used in *Westminster-Hall*, but from the Reason of another part thereof, which is called *the Law and Custom of Parliament*; which two Laws do as often differ from one another, as the Interest of a private Person happens to differ from the Interest of the Publick.

And thus having set forth the Nature of the Right or Privilege of Voting in Elections, I proceed in the next place, to consider the Nature of the Wrong.

2dly, As to the Nature of the Wrong or Offence committed by the Officer, in refusing to receive and admit on the Poll, the Vote of a Legal Elector, which he had offered and declared at the Election.

It may be observed 1st, That the Defendants did not by Force of Arms drive the Plaintiff away from the Election, nor by Menaces deter him; but they did not think fit to receive and admit his Vote on the Poll: Because they did apprehend to the best of their Judgments, that he was not a settled Inhabitant in *Alesbury*, but a poor Ostler, that shifted about for a Livelihood. And in case they had admitted his Vote, and the Election had happened to turn upon it, and upon a Dispute in Parliament the Plaintiff had appeared to be no Legal Elector, they had incurr'd a Penalty of 500 *l.* upon the Statute for a false Return; therefore they thought it the most safe and prudent way not to receive his Vote; and this is the Nature of the Offence, it was not an Act done, but omitted to be done; not with an Intent to do a Wrong to the Plaintiff, but for fear of doing Wrong to the Candidates, and of incurring a Penalty, and also of acting against their own Oaths and Judgments.

2dly, It may be observed, That in all Elections there is a Necessity that some Persons or other should be entrusted with the Management thereof, That neither Legal Votes should be refused, nor illegal Votes received, both which are equally prejudicial to the Rights of Electors.

3dly, That the Management of such Elections is wisely entrusted by our Constitution to the Sheriffs, Mayors, and other chief Officers, who are generally Men of the best Esteem and Credit in their Countries, and are upon their Oaths truly and faithfully to execute their Offices, to do Right as well to Poor as Rich, and to do Wrong to no Man.

4thly, That the said chief Officers are obliged not only by their Oaths, but also at the Peril of a great Penalty of 500 *l.* for a false Return, to take care that they do neither refuse any Legal Vote, or accept any illegal one, but that they do equal Justice to all Parties, according to the best of their Judgments.

5thly, That it would be highly unreasonable to require Officers upon their Oaths, and under a great Penalty, to return Members duly elected by Majority of Legal Votes, and at the same time not give them the least Liberty to judge of that Majority, or who are legally qualified to give their Votes in such Election.

6thly,

6thly, That therefore the said Officers, tho' Ministerial in other Respects, yet in this Particular they do all act in a Judicial Capacity; and the Nature of the Wrong is the same in this Case, as it is in any Judge of Westminster-Hall, that is mistaken in his Judgment: And no such Error will entitle the Parties injur'd to an Action at Law, altho' it should be laid *falso malitiose & scienter*: For says Lord Coke 12 Rep. fo. 24. *They who are intrusted to judge, ought to be free from Vexation, that they may determine without fear; the Law requires Courage in a Judge; and therefore provides Security for the Support of that Courage; and no other Judge has need of more Courage and Resolution to manage himself, and determine uprightly, than these chief Officers have; nor no other Judge determines in a Case of greater Consequence to the Publick, or of greater Difficulty in it self: for as a very Learned Judge observes, this Question of Majority is not a Question of Fact, but a Question of Judgment; a Question of very difficult Judgment, there are so many Qualifications of Electors.*

1st, *They must have 40 s. per Annum*: There the Value must be judged.

2dly, *It must be Freehold*: There the Title.

3dly, *It must be their own*: There colourable and fraudulent Gifts made many times on purpose to get Voices, must be judged.

4thly, *The Electors must be resident*: There the Settlement of the Party must be determined.

5thly, *There are many things that incapacitate Voices, as Bribery, Force, &c. and many other Questions arise that are of such Difficulty, that in the Debate of them much time is spent in Parliament, and sometimes the Committee determine one way and the House another; Is not this then a Question that refers to judgment?* Certainly it is, and therefore that Upright Judge concluded very well; *If we Judges (says he) that find our selves secure from Actions, should not be tender of others that are in the same Circumstances, it may well be said, Wo unto you, for you impose heavy Burthens upon others, but will not bear the least of them your selves.*

6thly, It may be observ'd, That the Elector (the Plaintiff) was not by such Omission or Default in the Defendants, depriv'd of his Right or Privilege of giving his Vote, as hath been suggested; for since he was admitted to come to the Place of Election, and was there ready and actually offer'd and pronounced his Vote for Sir Thomas Lee and Simon Mayne, Esq; and the Defendants were required to receive and admit the same, as is alleg'd in the Declaration. His Vote was as good and valid, and as well given on his part, by the Law and Custom of Parliament, by being thus offer'd and declared, as if it had been received and admitted on the Poll, and is so adjudged in the Determination of all Elections by the House of Commons, and consequently the Plaintiff could not be entituled to Damages for the Loss of his Vote, of which he was not deprived.

And thus it may appear, That neither the Right of the Elector, nor the Offence of the Officer was of such a Nature, as could entitle the Plaintiff to an Action at Law for Recovery of Damages. I shall now proceed to the third thing proposed, which was to consider

3dly, *The Nature of the Remedy which is given in such cases by the House of Commons* : And for the better understanding thereof I shall crave leave to observe,

1st, That a Petition being exhibited to the House of Commons by any Person or Persons whatsoever concerned in any Election, setting forth *That a certain Person returned to sit in Parliament, was not duly Elected by Majority of Legal Votes, and complaining of undue Practices in the chief Officers, and praying such Relief therein, as to that Honourable House shall seem just and equitable* : The House doth thereupon refer the Examination of the Petition, to the Committee for Privileges and Elections, who do not sit at the same time with the House, and can therefore give little or no obstruction to their Proceedings, as hath been objected.

2dly, The said Committee do thereupon meet at the time appointed by the House, and having chose a Chair-man, and read the Petition ; the thing that is generally first considered, is, as hath been observed, *the Right of Election* ; and this is either agreed by both Parties, or contested ; if contested, it is argued by Council, and doth frequently occasion long Debates, on several Points of Law ; which is a Demonstration from the constant Usage, that the House of Commons are the proper Judges in this case, and that the Officers have occasion to exercise their Judgments with great Caution in the Management of Elections ; but this Point being settled, and a Copy of the Poll deliver'd in and proved,

3dly, They proceed to the Examination of Witnesses and other Evidences relating to the Cause in Question ; and here it must be acknowledg'd that the Commons do not either in the Committee or in the House, administer an Oath to any Witness, which yet is no Dishonour to them, or Derogation from their Authority, as seems to be suggested ; but on the contrary, it is a sure Mark of their Antiquity, and of the great Veneration our Ancestors had for that August Assembly ; and it is also a Demonstration of the great Authority of that House, who alone have Power to punish Witnesses, that without the Obligation of an Oath shall deny or conceal the Truth upon their Examination before them.

It may be also observed, that as Juries are to consist of Persons of the Voisinage, because they are supposed to be consant of the Fact of which they are to give their Verdict ; so here the House of Commons may be presumed to be consant of the Facts and of the Veracity and Credibility of the Witnesses, because *the whole People of England are virtually present* : And if their not examining upon Oath were really an Objection to their determining the Right of Electors, how can they ever pass any Bill of Property, and much less of Attainder, with any Justice ; for in none of these cases do they examine Witnesses upon Oath ; and if it should be objected, that the House of Commons are not upon Oath as Judges and Juries are, which is the more specious Objection of the two ; let it be consider'd, that the Lords themselves are not upon Oath in all their Judgments.

4thly, When the case hath been fully and fairly heard, and the Council, Parties, and Witnesses are withdrawn, and after a solemn Debate amongst themselves upon any difficult point, the Committee come to some Resolutions, which they direct their Chair-man to report to the House for their

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Approbation, and in the Determination of every Election, the following Rules and Methods are observed.

1st, Every Legal Vote which was offer'd at the Election (as the Plaintiff's was) is upon Proof thereof, admitted and allowed to be as good a Vote, and as well given, as if the same had been received and admitted on the Poll by the proper Officer.

And this is the Reason why no single Elector was ever known to petition the House of Commons for Remedy against the Officer that would not receive and admit his Vote upon the Poll, because the Elector is not thereby debarr'd of his Vote.

And for the same Reason the Commons do never adjudge that such an Elector shall be restored to his Vote; but they take it for a standing Maxim of the Law and Custom of Parliament (which needs no Confirmation nor any Resolution of the Committee, or of the House) That every such Vote is as good in substance as it could be if it had been received and admitted on the Poll. And this is demonstrated, for that,

2^{dly}, The Person who hath the Majority of Legal Votes, tho' that Majority consists in such rejected Votes, is declared and adjudged to be duly Elected a Member to serve in Parliament; and the Person returned, who had the Majority without those Votes, is declared not duly Elected, and the Clerk of the Crown is order'd to amend the Return accordingly.

By which it evidently appears, that all those legal Votes, which were offer'd and refused, were good Votes, and well given, at the time of the Election; or else all those Determinations of the House of Commons would be very unreasonable and unjust: But since the Votes that are offer'd and refused are as good Votes as those that are offered and received, these Resolutions of the House of Commons are very just and reasonable; and the constant Determination of Parliament must either be condemned by an inferior Court, which is absurd; or else it must be allowed that the Plaintiff was not debarr'd of his Vote, and by consequence had no good Cause of Action for Recovery of Damages.

And when the Plaintiff lays down the Matters of Fact in his Declaration, and then draws a wrong Conclusion from the Premises, he shall not receive any Advantage from his own Mistake and Misrepresentation; for it is evident, of his own shewing, That the Plaintiff having offer'd his Vote for Sir T. L. and S. M. was not hindred from giving his Vote, to his Damage, &c. as in the Declaration.

And here by the way it may be observ'd, how necessary it is for the common Safety, that the House of Commons should be sole Judges of the Rights of the Electors as well as of the Elected; for otherwise their Authority would not be sufficient to answer the end for which it was establish'd, which was not only to find fault with the Officers, but to give the Petitioner Relief, and fill their House with Legal Representatives.

The receiving and admitting the Votes of Electors upon the Poll is only a Method or Means appointed to be observed by the Officers for the better Management of Elections, that no Mistake may happen, nor any Mismanagement be excus'd, but that every Default or Partiality in the Officers may be more easily detected and punish'd: But the Officers Duty is not made a Qualification for every Vote, which is neither better nor worse for

that Formality ; for neither doth the receiving and admitting, make a bad Vote good ; nor the refusing and rejecting make a good Vote bad ; but the Law of Parliament determines the Case according to the Majority of Legal Votes at the time of the Election whether they were received or not.

This receiving of Votes on the Poll is a Formality that was not annexed to the Electors Freeholds and Freedoms, neither is it inherent in their Persons by reason thereof ; but it is a Duty impos'd upon the Officer by the Law and Custom of Parliament, long after the original Institution of the Rights of Electors ; and therefore it would be highly unreasonable that the Electors should suffer by a Law *ex post facto*, which was not made for the Destruction, but Security of their Rights.

But altho' there is no particular Injury done to any Elector in this case, yet to all the Electors there is, and to their Representatives : For, 1st, The Officers are disobedient to the Order of the High Court of Parliament, whereby they are directed to do justice to all the Electors, and neither to receive the Votes of those that are not qualify'd, nor reject the Votes of those that are ; and for default in either of those cases, every Elector is as much concern'd as any one, and as much entituled to an Action, and to a proper and adequate Remedy for Redress thereof, because they are all equally concerned to have true Representatives ; but for the Reasons aforesaid, as well as for the Reasons in *Williams's Case* against Multiplicity of Actions, none will lye in this Case, neither is there any Remedy for any one, but for all the Electors.

2^{dly}, By this means it may so happen, that the Commons of England, and their Representatives in Parliament assembled, may, for some time, be deprived of one or more Legal Members to assist them with their Counsel in the great and urgent Affairs of the Kingdom ; (for the Election may happen to turn upon those very Votes) and then they must also labour under all the Inconveniencies that may happen to themselves and to the Nation, by having other Members in the mean time to sit in Parliament, who coming in by undue Practices may be instrumental in misguiding and perplexing the Debates of the House to the general Disadvantage of the Prince and People. And thus it may appear that the default of the Officer is not an Offence to the Party, but to the Parliament, and to the whole Kingdom ; and therefore,

3^{dly}, It is establish'd by the Law and Custom of Parliament, that all Sheriffs, Mayors, Bailiffs, and other chief Officers (concerned in the Management of Elections of Members to serve in Parliament, and who in that respect are the Officers of the Parliament) that shall be guilty of any Neglect or undue Practice in the Discharge of their Duty, are punishable by the House of Commons, by Imprisonment, &c. and not elsewhere : Which Punishment may be inflicted upon them, upon the Information of, and upon Proof made by any Elector or Electors whatsoever, whether their Votes were refused or received.

This Law is founded upon great Reason, and even upon a Necessity of preserving thereby the Constitution of Parliaments ; for if the Commons wanted Power to punish those Officers, or in case any other had Power so to do, besides themselves, in cases relating to Elections, they could never be secure of fair Returns or of a free Parliament.

Besides, it will be dishonourable to Parliaments, as a learned Judge observes,

serves, that there should be no protection in their Service; no Body can serve them chearfully and willingly at that rate; and to have others judge when their Servants do well or ill, will be to have others give Rules to their Servants and Service, which will not be convenient; and that these Officers do act in this particular Service as the Officers of Parliament, may appear, because the Parliament does exercise an immediate Jurisdiction over them in all those cases. The Court of Chancery is indeed the Repository for the Writs, but that Court does not meddle with the Returns or the Sheriff, nor issue out a new Writ, but by Warrant from the Speaker; and if the Return be too slow, the Parliament sends an immediate Order to the Sheriff; or if faulty, takes him into Custody, as for a Breach of the Privilege or Service of that House; and thus if they act as their Officers, the House of Commons alone must be the proper Judges of their Behaviour; so that it appears both by Reason, and by the Law and Usage of Parliament, that the House of Commons are sole Judges of the good or ill Behaviour of Sheriffs and other publick Officers in the Management of Elections of their own Members.

And thus having consider'd not only the Nature of the Right of the Elector, and of the Offence in the Officer, but also of the Remedy which is given in such cases by the House of Commons; I proceed,

4thly, To demonstrate that this Remedy is very proper and adequate to the Nature of the Offence; that is, it is very just and equal, adapted to the Nature of the Offence, most likely to prevent the Evil thereof, and most advantageous for the Publick Safety.

But, 1st, I crave leave to observe, that the Plaintiff's Action at Law is a Remedy that hath none of these Qualities; for it is not just and equal that the Officer should pay Damage to one that has not suffer'd any; neither is it proper that a publick Offence should be punished by a private Satisfaction; which is neither likely to prevent the Evil thereof, nor is indeed consistent with the Publick Safety.

The Offence is not to the Party but to the Parliament, and of the greatest Consequence to the Publick, whose Safety depends upon fair Elections and free Parliaments; Now then can any private Damages to the Party be a proper and adequate Remedy to the Nature of the Offence, to repair the Injury to the Publick, or prevent the Inconvenience?

Such Defaults in the Officers are either Mistakes and Errors in Judgment, which ought not to be determined by a common Jury; or else they are notorious and wilful Corruptions too big for an Action at Law, and only to be remedied by Authority of Parliament.

And if you respect the Right of the Elector, it is of such a Nature, so inherent in his Person by reason of his Freehold or Freedom, that no Omission or Default of the Officer ought to be suffered to destroy it; and therefore this Action that is pursued by the Plaintiff upon the Grounds of the Common Law, and supposes him to be debarred of his Vote, is a Remedy that is worse than the Disease; for certainly that Law that preserves a Right, is better for the Subject than that Law that first suffers it to be taken away, and then puts him to a great Expence and Trouble to recover it again, or to be repaired in Damages.

Neither doth this Action afford any Relief at all for that which is the principal Right of the Elector, to be truly represented in Parliament; so that in all respects the Action at Law is no proper Remedy.

But on the other side, the Remedy appointed in Parliament is every way proper and adequate, both with respect to the Nature of the Right, and the Nature of the Wrong: for by the Determination of the House of Commons, the Right of the Elector in point of Voting, is fully preserved, notwithstanding the Omission and Default of the Officer: And the principal Right of being truly represented in Parliament, is also secured in that Determination; and by the same means there is Justice done to all the Electors, both of that particular Place and of the whole Kingdom: Not only by passing a right Judgment for the Legal Representatives, but also by punishing the Officers for any undue Practice.

This is a Remedy that is just and equal to all Parties, adapted to the Nature of the Offence, most likely to prevent the Evil thereof, and most advantageous for the publick Safety.

Our wise Ancestors in the Settlement of this Remedy, did not confine their Thoughts to the Reason of the Common Law, in private Causes of *Meum and Tuum* in *Westminster Hall*; but extending their Care to the Welfare of the Publick, did establish their Conclusions upon the noble Foundation of Government, and upon the general good of the whole Kingdom.

They wisely considered the Nature of this Privilege belonging to the Electors, and the end for which it was established, which was not for any private Advantage, but for the common Safety; and therefore having their Eyes fixed on the Liberties of their Country, and the Constitution of Parliaments, they apply'd such a Remedy as was every way adapted to the Preservation of them.

By an Action at Law for Recovery of Damages, one Elector would have a Remedy to the Destruction of all the rest, as shall be demonstrated; but by this Determination in Parliament every Elector both rich and poor, will have their Rights effectually secur'd to them.

The Vote of a single Elector join'd with others, will either carry the Election or it will not: If not, he suffers no real Damage in any respect, for his Vote is allow'd in Law, and he is represented by Legal Representatives; if it will, and the Candidates for whom he offered his Vote are not returned, then he may have Justice done him in manner aforesaid, and (which is a thing worthy of every Elector's Consideration) at the Expence of the Candidates: But in case they are returned, then he has no Wrong done him, for the Reasons aforesaid.

And what other Remedy could be more proper and adequate to the Nature of this Case? For hereby the Right of every Elector is most effectually secur'd. If the Elector offers his Vote, the Law takes it, tho' the Officer should be wanting in his Duty: And the Wrong is most effectually punished by taking the Officers into Custody, and expelling the Members that came in by Undue Practices.

But when the Inconveniencies of such an Action at Common Law, and the Conveniencies and Advantages of this Remedy in Parliament shall be fully stated and consider'd, it will appear very difficult, how to find out a Remedy more destructive than the former, or more advantageous than the latter to the Constitution of Parliaments or the publick Safety; for,

It is a Free Parliament, that is, the Great Bulwark of the Liberties of England, and this will be effectually secur'd by the Determination of the House of Commons, and rendered impracticable by Actions at Law.

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A free Parliament depends upon *Free Elections*, but no Elections can be free, if there be any *Terrour* on the Electors, or on the Officers; for as the Electors must not be hinder'd by Force or Threatnings, but must be free to come to the Election, and to offer or pronounce their Votes to the proper Officer for which of the Candidates they please; so the Officer must not be terrify'd with fear of a *Multiplicity of Vexatious Suits*, but must be free to act indifferently as a Judge in the Management of such Elections, according to his *Oath* and Duty of his Trust, and as well to reject the bad Votes as to receive the good; and ought not to be accountable to any but to those whose Officers they are, and with whom are intrusted the Rights and Liberties of all the Commons of England.

And thus I humbly hope it is demonstrated, That the *Remedy* in the House of Commons is very proper and adequate to the Nature of the Offence. I proceed therefore to the next Position.

The Fourth P O S I T I O N.

That the establishing another Jurisdiction besides that of the House of Commons to hear and determine Controversies between the Electors and Officers concerning the Right of Voting, or the Qualification of Electors to give their Votes in the Election of Members to serve in Parliament, will expose all Mayors, Bailiffs, and other chief Officers to *Multiplicity of Actions, Vexatious Suits, and unsupportable Expences*, and will subject them to different and independent Jurisdictions, and inconsistent Determinations in the same Case without Relief; and upon the whole Matter will not be consistent with the Constitution of Parliaments, or the publick Safety.

This Position hath been in great Measure proved on several Occasions in the precedent part of this Discourse, but the same may more fully and plainly appear by the following Observations.

1st, All Mayors, Bailiffs, and other chief Officers, will either for fear of these kind of Actions at Law, admit all Persons who shall upon any pretence or Colour whatsoever offer their Votes at any Election, tho' they have in Reality no Right of Voting at all, or else they will refuse them; if they admit them, they will subject themselves to Actions on the Statute for a false Return, and to a Penalty of 500 l. if they refuse them, they will be in Danger of being ruined by a Multitude of Actions for such Refusal; for all these Actions must be defended, tho' wrongfully and unjustly prosecuted, at the single Expence of such respective Officers: So that there is no Safety for these chief Officers, Whether they admit or refuse illegal Votes; whether they do their Duty, or do not, it is the same thing; they cannot be safe nor free from *Multiplicity of Actions, Vexatious Suits, and unsupportable Expences*, to the utter Ruine of them and their Families; and is this consistent with the Constitution of a well ordered Government, or the publick Safety? But

2^{dly}, Upon every contested Election, the Commons do first declare the Right of Election as hath been set forth, which the chief Officer hath either observed, or not; if he hath, he is safe in Parliament, but not at Law; for no Jury upon their Oaths are bound to find the Right of Voting, otherwise than appears to them by the Evidence that happens to be given at the

the Tryal; if the Jury find the Right of Election to be in other Persons than is declared in Parliament, then is the Officer acquitted by the House of Commons, who is the Supream Court in such Cases, and condemn'd by a Court of an inferior Nature; and is it reasonable to subject the Officers to different and inconsistent Determinations in the same Case? Can a Man be Guilty and Innocent at the same time? Is it consistent with the Order and Course of Justice, or with the Honour and Wisdom of the Government, or with the Dignity of Parliaments, that an Inferiour Court should thus contradict a Superior in the same particular Instance? But

3dly, Suppose the chief Officer hath not observ'd the Right of Election, but hath rejected several Votes of Persons duly qualified, and thereupon the chief Officer is committed to the Custody of the Serjeant at Arms, attending the House of Commons; which Confinement with the Fees attending it, hath been thought in most Cases a sufficient Punishment; yet notwithstanding he hath been once sufficiently punished for this Offence, he, by such a Precedent as would be established by this Action, may be punished over again by as many Actions, Verdicts, Judgments, and Writs of Execution for Damages, as there were Legal Electors whose Votes were rejected by him; and is this consistent with the Privileges of English Men? With Magna Charta, or with the Bill of Rights? And with the Fundamental Maxim of the Common Law of England, that no Man shall be twice punished for the same Offence? *Nemo bis punitur pro eodem delicto.*

4thly, It is agreed by both Houses of Parliament, That the Lords and Commons are independent of one another, and sole Judges of their own Privileges; but if such Actions can be brought at Law, they may all as well as this be removed by Writ of Error into the House of Peers, and not only the Officers made subject to two different and independent Jurisdictions and Determinations in the same Case; which is absurd; but the Commons themselves by degrees might be made precarious and dependent on the Power of the Lords; for if a Free Parliament depends on Free Elections, and Free Elections upon the Officers; and if the Officers can have no Safety or Protection from the Commons, whether they accept or refuse Votes, whether they do well or ill, but must at last be brought to the final Judgment of the House of Peers, it will not be difficult to determine which way the Officers will be inclined for their own Security, tho' it be to the Ruine of the Constitution.

If a Sheriff (or other chief Officer, saith a learned Judge) be thus liable to Actions at Common Law, let us consider what and whom he is to fear; he may fear the Suit of the Party, and he may fear the Suit of the King: it follows necessarily that if an Action lies, an Information for the King will also lie for the Misdemeanour of his Office, if it be not a Case privileged by the Complexion of it, as *Parliamentary*, from being examined in *Westminster-Hall*; if he may be punished at the Suit of the Party, he may certainly as well be punished at the Suit of the King; if so, where is the Officer's Security? will his own Innocence secure him? that will be tryed by a Jury of the Country where the Election was, where it may be they will be of an opposite Party: The Party may wait his Opportunity, and question him twenty Years after; and if he be condemned, his Punishment is unlimited, a fine may be set any height for the King, and

and Damages may be given to any Value for the Party; where is his Security upon such Proceedings? will he not be more afraid of such Punishment at Common Law, than of any Punishment by the Commons? will not, nay, may not this Terror make him desire to please them that can thus punish him, rather than do right, and will not that be dangerous to the Constitution of Parliaments?

5thly, It is a standing Order of the House of Commons, *That no Peer in this Realm hath any Right to give his Vote in Election for any Member to serve in Parliament*; for the House of Peers are one distinct Branch of the Constitution, but not the Representatives of the People; and as no Peer was ever charged with the Burthen of paying Wages to the Persons Elected; so the Commons alledge, they have no Right to give their Votes in the Election of them; for as the Lords are free, so ought to be the Commons, by our Constitution; and therefore it is another standing Order,

That for any Lord of Parliament to concern himself in the Election of Members to serve for the Commons in Parliament, the same is a high Infringement of the Liberties and Privileges of the Commons of England; but if such a Precedent as this were established, they would not need to take any great pains to influence Elections; the Officers would soon know their Lords and Masters; and who alone were able to protect them from the dangerous Consequences of such a new Establishment?

6thly, The House of Commons have a standing Committee for Courts of Justice, in order to enquire and redress any Abuses or Grievances arising in those Courts, which is a great Privilege and Security to the Commons of England; but if the Judges of those Courts have a Power to determine the Rights of the Electors, whose Votes do constitute a House of Commons, they must needs have a great Influence over the Members of that House; and what will then become of the Security of the People?

7thly, And Lastly, There is nothing ought to be so dear to the Commons of England as a free Parliament; that is, an House of Commons every way free and independent, either of the Judges or Lords; free in their Elections, and free in the Determination of those Elections; free to complain of Offenders, and free from fear of great Men in the Prosecution of them; free to preserve the Properties of the Subject, and free to part with a share of them for the Publick Service; this is a free Parliament by our Constitution: But if any Persons whatsoever, tho' they have no Right of Voting, shall be free to give their Votes at any Election, and if their Votes are not received and admitted on the Poll, shall be free to commence Actions against the Officers at the Expence of a powerful Candidate, and when Judgment is given against them in Westminster-Hall, shall be at liberty to bring it into the House of Peers; and if their Lordships have Authority in this case to give Judgment against the Officers, in a Cause properly cognizable before the House of Commons, and concerning the Rights and Privileges of that House, the Nation may have a free Parliament in one sense, but the Commons conceive it will be directly contrary to the Design of the Constitution and the publick Safety; there may be a Parliament that will be free indeed to do evil, but not to do good; free to part with the Peoples Money, and divide it amongst themselves, but not to be frugal and saving of the

the publick Treasure ; free to run the Nation twenty or thirty Millions more in Debt, but not to find out proper Measures to ease them of so great a Burthen : And, in short, they may be free and ready to give up those Rights and Privileges which our Ancestors have so bravely, and at the expence of so much Blood and Treasure, maintained and delivered down to their Posterity ; but not to follow the noble Example of the present House of Commons, who have so chearfully exposed themselves to the Displeasure of great Men, in Defence of the Rights of the Commons of England.

I have now gone through the Argument for the Commons, which may give some Satisfaction to the World of the Sincerity of that great Assembly, and of their Fidelity to the Trust reposed in them ; and I hope that it doth, in some measure, answer the Argument for the Lords ; but yet before I come to a Conclusion, I shall beg leave to take notice of two or three of the most material Arguments on the other side.

And as to the three Positions laid down by the Lords, the Commons do not dispute (tho' others do) the first Position, That the Plaintiff, as a Burgess of Alesbury, had a Legal Right to give his Vote for the Election of Parliament Burgesses : Nor the second, That as a necessary consequence thereof, and an Incident inseparable to that Right, he must have a Remedy to assert and maintain it.

But then they do, for the Reasons aforesaid, deny the third Position, That this is the proper Remedy which the Plaintiff hath pursued, being supported by the Grounds and Principles of the ancient Common Law of England.

For altho' it is a Maxim, That every Right must have a Remedy to assert and maintain it ; yet it is not determined by that Maxim, what sort of Remedy, or in what Court, though it is by another, and that is, *Optimus Legum interpret est Consuetudo*, Custom is the best Expounder of the Law. And these two Maxims put together, will both determine for the Right of the Commons ; for constant Usage doth support their Determination, but there is no Usage at all for the Action at Law.

It is urg'd, that since the antient Common Law of England gives the Electors their Freeholds, it ought also to preserve to them their Right of Voting for the Security thereof ; and that therefore the Plaintiff ought to have his Remedy in the Courts of Westminster-Hall ; but with great Submission, this is begging the Question ; for tho' it be agreed, That the same Law that preserves the Freehold, shall preserve all Benefits, Rights and Advantages depending thereupon or relating thereunto ; yet the Question still remains to be determin'd, and that is, Which way this Law shall be administred, whether by the Judges in Westminster-Hall, or by the House of Commons, the Representatives of the People ? Whether by those, who, as has been said, have so little Cognizance of Parliamentary Matters, as to declare 'tis not proper for them to give any Opinion of them ? or by those who are the Trustees of the People ? and such Trustees too, as have a Power over the Freeholds themselves ? and that Question hath, I hope, been determin'd, to the Satisfaction of all unbias'd Judgments.

And forasmuch as the Law and Custom of Parliament is a part of the antient Common Law of England, and one of the chief and principal parts of it too, as being exercised in that High Court, which is superior to the Courts of Westminster-Hall ; therefore an Action like this, that is not consistent with the Law or Constitution of Parliament, can never be supported

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ted by the Grounds or Principles of the ancient Common Law.

It is an antient and standing Maxim of the Law of England, *Privilegium non valet contra rempublicam*, and that it is better to suffer a private Mischief than a publick Inconvenience; and therefore it is impossible that any Remedy can be supported by the Grounds and Principles of the antient Common Law of England, which in favour of one Elector, tends to the Ruin and Destruction of all the rest, and of the whole Constitution.

It is alledged in the Argument for the Lords, p. 13. l. 61. That the Common Law is constant Usage for time immemorial; how then can this Action be supported by the Common Law, when no such Action was ever brought before; and as the famous Judge Littleton did observe in the like case, so it may be argued in this, *If the Rights of the Electors had been elsewhere determinable than in Parliament, by any Action at Common Law, it should be presum'd that one time or other such an Action would have been put in ure*, Lit. Sect. 108.

As to the Statutes of Chester and Durham, tho' they say the Inhabitants in general have suffer'd Loss and Damage for want of sending Members to represent them in Parliament, yet they no where say, That every particular Elector suffers Damage, if his Vote being offer'd, shall not be received and admitted on the Poll, which is the point in question.

And the Statute of Westminster the first, rightly understood, is so far from being an Argument for the Action, that it is directly against it; The King commandeth upon great Forfeiture that no great Man or other by Force of Arms, or by Malice or Menaces shall disturb any to make free Elections; but who are those that make the Election, but the Electors and the Officers? as appears in the same Argument, p. 8. l. 11. therefore both ought to be free from Force and malicious Prosecutions; and it is plain that the said Statute was not made to destroy the ancient Authority of the Officers to judge of the Majority in those cases, which is implicitey confirm'd by every Statute that inflicts a Penalty upon them for not judging rightly; but only against great Men, who had in those times disturb'd and influenc'd Elections, and by their great power, deterr'd both the Electors and Officers from discharging their Duty.

But the Officers are charg'd to have done this *malitiously and fraudulently*; however that will not make a thing actionable that is not so in its own nature; for as a learned Judge observes, 'If we should make the words *fraudulently and malitiously* in the Plaintiff's Declaration support the Action, without a fit Subject matter, all the Actions of Mankind would be liable to Suit and Vexation; they that have the cooking (as he calls it) of Declarations in Actions of the Case, if they be skilful in their Art, will be sure to put in the words *fraudulently and malitiously*, let the Case be what it will, they are here, Pepper and Vinegar in a Cook's Hands, that help to make Sauce for any Meat, but will not make a Dish of themselves.

There are many Cases as well as this, where no such Averment will support an Action at Law, as in the Case of a Judge, an Indictor, and a Witness; and where a Person does not act voluntarily, but by Compulsion, as in this case, in discharge of his Duty; and likewise where the Matter is not in its own Nature cognizable at the Common Law, but is *alieni fori*; as for instance, no Action will lie for Breach of Trust, tho' done *fraudulently and malitiously*, because the Determination of the principal thing, the

Trust, does not belong to the Common Law, but to the Court of *Chancery*; and certainly the reason of the Case before us is much stronger, *as the Parliament ought to have more Reverence than the Court of Chancery*. Besides, in the present case, the Defendants could not be said to do that *malitiously*, which was not done at all, for it appears of the Plaintiff's own shewing, that he was not debarr'd of his Vote.

As to the Statute of *Westminster the Second*, that Act was not made to draw Actions from one Jurisdiction to another, for then it might as well support an Action in the Case of *the Elected* as of *the Electors*, or in the Case of a *Trust* in *Chancery*, or a *Legacy* in the *Spiritual Court*; but *where in one Case a Writ is found, and in like Case falling under like right, and wanting like Remedy, none is found, then a new Writ may be framed*; as for instance, before the Statute, an *Affize of Nuisance* did lye against the Person that levy'd the *Nuisance*, but not against his *Alienee*; because there was a *Writ* found in one Case and not in the other, which was of the same nature, cognizable in the same Court, and wanted the like Remedy; but no *Writ* can be found in the ancient Register against a *Sheriff* or other Officer, for *Misbehaviour in his Office*, in any matter concerning the *Right of Voting or Election of Members*, therefore this Case is not within the meaning of that Statute; and indeed no two Cases, one at Law and the other in Parliament can want the like Remedy, because they are distinct and vary from each other in many respects, and are determinable by different Courts, Laws and Customs.

'If we shall allow general Cases (says a learned Judge) as an Action on the Case is, to be applied to Cases relating to Parliament, we shall at last invade Privileges of Parliament, and that great Privilege of judging their own Rights and Privileges.

But how *Magna Charta* comes at last to be planted against the House of Commons, I cannot imagine, as if the Law of Parliaments were not *the Law of the Land*, as well as the Law of *Westminster-Hall*. If the Makers of that Statute were alive to answer for themselves, or if you will allow of the History of those times to be the best Interpreter of their Minds, it would appear that they that were so careful to preserve the Rights of every particular Subject, did certainly much more intend to preserve the Rights of all the Commons of *England*; neither is it reasonable to construe the Intent of that Statute to be, for the preservation of the Rights of the People against their own Representatives, but against the illegal Proceedings of the great Officers of the Crown.

There is a great difference (says the Argument) between the Right of *the Electors*, and the Right of *the Elected*, the one is a temporary Right to a place in Parliament, the other (they say) is a *Freehold or Franchise*. Now this Distinction tends to avoid the Strength of a powerful Argument for the Commons; but it is not at all avoided by it; for the Nature of this Right hath been explained; and which is more valuable is the question; but certainly the Right of *the Elected* must be in every respect more valuable in Law than the Right of an *Elector*; for the *Elector* acts for himself, the *Elected* act for the whole Kingdom; the *Elector* has a privilege of Voting in the Country by reason of one *Freehold or Freedom*, the *Elected* hath a Privilege of Voting in Parliament by reason of a great many; now since it is adjudged by the Lords themselves in the great Cases of *Soames* and *Bernadiston*, &c. that the Right of the *Elected* are solely

exclusively

cognizable in Parliament and not elsewhere, a fortiori, the Right of the Elector must be so too; for if the Right of the Elected tho' more valuable, and consequently more under the Care of the Common Law, be not cognizable elsewhere than in the House of Commons, because it is a Matter of Parliament, how can an Action lie for the Right of the Elector, which is less valuable, and yet is the Foundation of that Parliament? And supposing a Wrong done to the Elector, it can be but for one Election; and therefore is as temporary as the other; and the Argument is still the stronger for the Commons, for that in *Soames and Bernadiston's Case* the Action was brought in Pursuance of the Judgment given by the House of Commons, and was the Foundation of those Learned Judges Opinion, who argu'd for the Action; alledging, there was no clashing of Jurisdictions, and that the Court of King's Bench was in that case but ministerial and subservient to the House of Commons and supported their Judgment: But all this would not do, the Judgment in the Kings Bench was revers'd in the Exchequer Chamber, and that Reversal affirm'd in the House of Lords; because the House of Commons were the sole Judges of their own Rights and Privileges, and of every thing that is necessary for the Support thereof; and if an Action at Law will not lye in Affirmation of the Commons Judgment, how can it be supported in contradiction to it? and yet this must frequently happen, if the Courts below assume this Jurisdiction, even before the Case hath received any Determination in the House of Commons.

In the Case of *Strode and Nevil*, an. 1655, in an Action on the Case against the Sheriff for a false Return to the Damage of 2000*l.* after Verdict for the Plaintiff, and 1500*l.* Damages, the Court of King's Bench adjourned the Case into Parliament, *propter difficultatem*, whether the Action did lye or not? where it is to be observ'd that it was not adjourn'd into the House of Peers, but into the House of Commons, as the only proper Judges in all Cases of that nature concerning Elections; so careful were they of the Rights of the Commons.

And let not the Iniquity of those times of Rebellion be objected to this Instance; the Argument from thence extremely confirms the Right of the Commons; for if it be considered that *Cromwell* had then created a new House of Lords, and wanted nothing but a House of Commons to establish his Usurpation; that to this purpose he had form'd a new Model of an House of Commons, and overturn'd the Method of Elections, depriving all the Boroughs of their Rights, and causing the Choice and Returns of Members to be made by the County; yet the Name of a House of Commons remained, and even that was so revered in those days, that none would attempt to deprive them of their essential Privilege of judging of Elections; no Influence could byass the Judges; they thought it to inherent, that they would not presume to intermeddle in it.

As to the Officers being arbitrary, they will be no more encouraged to be arbitrary by leaving the Determination to the Commons, than they have been ever since the Foundation of the Government. But 'tis said the Commons may by these means chuse their Electors. No more than has ever been practis'd, by determining doubtful Elections; and if that Determination be esteem'd an Election, would it be safer for the People, that the Lords or Judges should elect a House of Commons? For if the Reproach were just, as it is not, that the House of Commons do chuse whom they like best; is it im-

possible that the Lords in that day should do so too; who are also Men, and alike subject to Passions?

As to the Distinction that is made, that the House of Commons are Judges of the Right of Electors to one purpose but not to another; that is a very new Distinction, and is fully answer'd in the precedent Discourse, where it is demonstrated not only that the Commons are the proper Judges of those Rights, but the sole Judges thereof; the latter being the natural Consequence of the former, both for their own Security, and to avoid all the Inconveniencies above mentioned, by two different and inconsistent Determinations in the same Case.

It is alledg'd, That *the ultimate Resort in point of Judicature is lodg'd with the Lords*; And therefore upon a Writ of Error brought before them, they may determine as they think fit; but that is, I presume, according to the known Laws and Statutes of the Realm, for with great Submission, their Lordships have no Power by their Judgments to change the Law, or to take from the Commons that Judicature which legally belongs to them; or if they do, the Commons may legally protest against it, or which is worse, be justly accus'd of a Breach of Truſt.

It is said, that if this Action did not lye, *how would occasions of Complaint be multiply'd*? Answer, just as much as they have been heretofore, before any such Action was ever brought, which is just none at all; but the Officers at this rate, may reject the Votes of Electors with Impunity; that is to say, at Common Law, but not in Parliament; where the Punishment is sometimes thought to be too severe: But then *the Remedy in the House of Commons is worse than the Disease*; why so? because the Elector has a Remedy at the expence of the Candidates? or why worse in this case, than in all others since the Conquest? But *the Commons want time*: Leave that to themselves; when they have not time to preserve their own Privileges, they may pray to the Lords or Judges for their Assistance. But *they are not upon Oath*: Nor the Lords neither; they cannot give Damages, there is none due, neither is that point determined. But to deny this Action, is to deny the Benefit of the Law: Not at all; it is to preserve the Order and Course of Justice for all and every one that wants the Benefit of it. But that can never be a Privilege of Parliament that is incompatible with the Rights of the People: True, but this is so far from being incompatible, that it is absolutely necessary to preserve their Rights.

And thus with great Submission it seems to be demonstrated, That the Plaintiff had no good Cause of Action in this Case,

1st, Because the Plaintiff was not hindred by Force or otherwise from coming to the Election, nor from offering and declaring his Vote; and consequently was not deprived of his Right, or debarr'd of his Vote by the Default of the Officer, in not receiving and admitting the same upon the Poll.

2dly, Because this is a matter of Parliament, and all such Matters are cognizable there and not elsewhere.

3dly, Because there is a Remedy appointed in the House of Commons to punish this Default in the Officer, which is proper and adequate to the Nature of the Offence.

4thly, Because such a new Precedent as this, will introduce a Multitude of Inconveniencies, by exposing Mayors, Bailiffs, and other Officers, whether they do discharge their Duty or not, to multiplicity of Actions, vexatious Suits, and unsupportable

unsupportable Expences, and will subject them to different and independent Jurisdictions and inconsistent Determinations in the same Case without Relief.

5thly, Because such Actions are not consistent with the Constitution of Parliaments, or the publick Safety. And here I might also add,

6thly, ' Because such Officer as to the receiving or refusing Votes, and declaring a Majority, doth act as a Judge.

7thly, ' Because he is not admitted to take Security to save him harmless in such Cases; and it would be the most unreasonable and grievous thing in the World, that he should be bound to act without any Deliberation, and not to be allowed to take any Security, and yet be liable to an Action, which way soever he takes.

8thly, ' Because this is a new Invention, and ought to have the same Fortune that other *Novelties* heretofore attempted in our Law have had; and especially in Matters relating to Parliament there is no need of introducing *Novelties*; for the Parliament can provide new Laws to answer any Mischiefs that arise, and it ought to be left to them to do it.

9thly, ' Because general Cases at common Law (as an Action upon the Case is) ought not to be applied to Cases relating to Parliament; for if they should, we might by the same Reason invade all the Privileges of Parliament, and even that great Privilege, of judging of their own Privileges.

10thly, Because it would be both dishonourable and dangerous to Parliament, that there should be no Protection for such Officers in their Service.

11thly, and Lastly, Because such a Proceeding would occasion a change of the Law, and the Commons of England were of the same Opinion with their Ancestors, who unanimously declared, *Nolumus Leges Anglia Mutari.*

From what hath been said, the Votes and Resolutions of the House of Commons are to be justified in every Particular.

1st, That they have the sole Right to examine and determine all Matters relating to the Right of Elections of their own Members; for else there can be no such thing in England as a Free Parliament, or a Free People. And hence it follows,

2dly, That neither the Qualification of any Elector, or the Right of any Person elected, is cognizable or determinable elsewhere, except in Cases otherwise provided for by Act of Parliament. And it is also evident,

3dly, That the determining the Right of an Elector in any Court of Law, will expose the Officers to all the Inconveniencies above-mentioned. And from those Premises it will also follow,

4thly, That Matthew Ashby having in Contempt of the Jurisdiction of the House of Commons prosecuted the chief Officers of Alesbury at Law, for not receiving and admitting his Vote on the Poll, was guilty of a Breach of the Privilege of that House. And therefore it was highly necessary that the Commons should defend their Privileges by the two last Resolutions, viz.

5thly, That Whosoever shall presume to prosecute or plead in such an Action, are guilty of the Breach of the Privilege of that House. And

6thly, That these Resolutions be fixed on the Gates of Westminster-Hall.

These are the only Remedies we have, and which our Ancestors have formerly made use of on the like Occasion to defend the Rights and Liberties of the Commons of England: And it is truly observed on the other side, That they who release their remedy, do lose their Right; to which the Commons of England can never consent.

Give me leave then in the last place, and with all due Regard and Deference to the House of Peers to examine their Lordships Resolutions, and how far the House of Commons are justly to be affected by them.

As to the first Resolution, It is agreed, That every Legal Elector that is wilfully hindred by the Officer, or any other, to give his Vote, may maintain an Action at Law; in case that Hindrance was by any Act done, as by open Force or otherwise, but a bare Nonfeasance, Omission, or not receiving his Vote, is not such a Hindrance, as will support an Action; because the Plaintiff is not thereby debarr'd of his Vote, as hath been demonstrated.

As to the Second Resolution, The same depends on the former; for the Commons do not assert what is there suppos'd; but what they have asserted, is so far from being Destructive to, that it is absolutely necessary to preserve the Property of the Subject and the Freedom of Elections, as hath been already proved; and it is so far from Incouraging Corruption and Partiality in Officers, that it hath been found the best way to prevent it.

Neither will it subject the Freeholders and the Electors to, but on the contrary, will preserve them, as it hath done hitherto, from any Absolute or Arbitrary Power whatsoever.

As to the Third Resolution, Since it appears that the House of Commons have the sole Right of Judicature in these Cases, and that Ashby in Contempt, and to the Subversion of their Jurisdiction, and even of the Constitution of Parliaments, did commence and prosecute an Action at Common Law; it is humbly conceived, that the Commons declaring him guilty of a Breach of the Privilege of that House, did not tend to destroy, but preserve the Judicature of Parliament; and was so far from subjecting the Law of England to the Votes of the House of Commons, that those Votes were made in Defence of the Law and Custom of Parliament, which is the highest and noblest Branch of the Law of England.

And as to the Fourth Resolution, The Commons conceive that this Proceeding may be justified from the Fundamental Rule and Maxim of the Law of Parliaments above-mentioned, That the House of Commons are sole Judges of their own Rights and Privileges; and therefore to assert their Rights, is not to controul but support the Law, it is not to hinder but preserve the Course of Justice; neither does it subject the Properties of English Men to the Arbitrary Votes of the House of Commons, but on the contrary is the only Means to secure and preserve from Arbitrary Power the Rights and Liberties of all the Commons of England.

And thus upon the whole Matter, we will conclude as we begun: No such Action as this was ever brought before by any Elector, since the Foundation of the English Government. This Assertion alone, if it be true, and we don't find it pretended to be controverted, were Reason enough in all prudent Administrations, to prevent even the Attempt of introducing so dangerous and so entirely new a Practice; which it is not possible, in the Nature

Nature of our Constitution, that the Commons of *England* in Parliament assembled, of what Temper soever constituted, can suffer to be brought upon them.

In all former Times private Persons have been afraid to make Experiments entirely new in any Government, and the Attempts of it have very often ended in the Disturbance of that Government, where they were practised; but more commonly in Punishments very remarkable on the Promoters.

But in this Age, where Men do distinguish themselves by many new Notions in Religion, Politicks, and Morals, some have presumed to make Steps very contrary to the Prudence of all their Predecessors; and many Contradictions break out, to the Surprize and Amazement of private poor Understandings. All *Parties* are to be discountenanced as Enemies to publick Peace and Quiet, yet *Factions* do in Truth grow higher than ever they were known; Union and Moderation are piously recommended from the Throne, to make us all happy, yet Men have found out many Inventions to foment and widen Disputes, unprecedented in their Warmth and Bitterness, even amongst the Estates of Parliament, from whose Unanimity in Councils alone those mighty desirable Ends of Peace and Union are to be hop'd for; and to compleat all this Unfortunate Conjunction of Affairs, against a New Parliament which may be very soon called, and cannot be long delayed, there is a Proffer made for a new Method of trying, who shall be the Electors of it: Which if it should be practised, cannot but beget a new Calamity.

There have indeed been Princes, who have required the publick Officers to return such Members as they should name; but it is happy for us, that we are blessed with an Excellent Queen, that does not desire to exercise any such Power; and it is happy for us too, that we have Judges who do not think that they or the Lords have Power to determine the Right of our Electors, and consequently of our Elections; and that we have yet a House of Commons to assert our Rights against such Innovations; And since I may with Truth and Reason assert, that even the House of Commons, tho' Plenipotentiaries of the People, cannot surrender their Essential Rights, which they were chosen to defend; it is not to be wonder'd, if they do not tamely suffer any others to take from them, what they themselves have not Power to give up; and that is, these fundamental Rights and Privileges of the House of Commons, which are absolutely necessary to preserve *Free Parliaments* and a *free People*.

F I N I S.